A **EVERISE HECTARES SDN BHD**

v.

CITIBANK BHD

B COURT OF APPEAL, PUTRAJAYA
ABDUL MALIK ISHAK JCA
HISHAMUDDIN MOHD YUNUS JCA
KANG HWEE GEE JCA
[CIVIL APPEAL NO: W-02-951-2006]
C 20 SEPTEMBER 2010

CIVIL PROCEDURE: *Amendment - Parties - Application to add second defendant company and prevent it from taking possession of auctioned land - Issues raised - Whether similar to issues raised in earlier*
D *injunction application that was dismissed - Whether res judicature principles applicable*

CIVIL PROCEDURE: *Amendment - Parties - Application to add second defendant company and prevent it from taking possession of auctioned land - Bona fides of application - Delay in filing - Earlier*
E *dismissed injunction application - Whether amendment a tactical manoeuvre to obtain injunction dismissed*

The appellant company took a housing loan with the respondent bank in the sum of RM1.5 million for the purpose of purchasing a
F bungalow lot land ('the said land'). The appellant defaulted on the loan and the respondent proceeded to sell the said land by way of public auction. The appellant then filed an application for an injunction to prevent the respondent from proceeding with the auction ('injunction application'). The High Court judge dismissed
G the injunction application. The respondent continued to proceed with the auction and successfully sold the said land to a company called Fenomena Kualiti Sdn Bhd ('Fenomena Kualiti') at the price of RM1,548,603. The appellant's agent attended the auction but did not participate in the auction exercise. After seven months and
H 27 days following the auction exercise, the appellant filed an application to amend its originating summons against the respondent to add Fenomena Kualiti as the second defendant ('the amendment application'), and to prevent Fenomena Kualiti from taking possession or dealing with the said land. The High Court
I judge dismissed the amendment application and the appellant appealed to this court with the respondent objecting to the appeal.

Held (dismissing the appeal with costs)
Per Abdul Malik Ishak JCA delivering the judgment of the court:

(1) The appellant clearly sought for a second injunction over the said land by way of the amendment application. The first injunction application had been dismissed and the appellant had chosen not to appeal against its dismissal. The doctrine of *res judicata* applied in favour of the respondent. Further, the issues raised in the amendment application were also raised by the appellant in the injunction application. The appellant could not, as a matter of law, raise those issues for the second time. (paras 13, 14 & 25)

(2) The amendment application constituted an abuse of the process of the court because the appellant was seeking a second injunction to prevent dealings with the said land contrary to the fact that the first injunction application had been dismissed. It was a useless attempt to attack the outcome of the public auction and should not be allowed to succeed. (paras 28 & 29)

(3) The amendment application was not made *bona fide*. The delay of seven months 27 days before the filing of the amendment application showed that there was no due diligence on the appellant's part. (paras 30 & 31)

(4) The filing of the amendment application was a tactical manoeuvre on the appellant's part to delay and prevent the respondent from completing the sale of the said land to Fenomena Kualiti. The appellant should have appealed against the dismissal of the first injunction application and applied for an Erinford injunction pending the appeal to the Court of Appeal. Instead the appellant filed the amendment application some months after the dismissal of the injunction application. Tactical manoeuvrings were frowned by the courts (see *Tetuan Tanjung Teras Sdn Bhd & Ors v. Tetuan Syn Tai Hung Trading Sdn Bhd; Lim Nyang Tak Michael v. ACE Technologies Sdn Bhd; Ismail Ibrahim & Ors v. Sum Poh Development Sdn Bhd & Anor*). (paras 35-38)

(5) The general rule that an amendment would be permitted if the opposing party did not suffer an injustice as a result of the proposed amendment was subject to the overriding consideration that the court must give to the position of all parties in

A exercising its discretion to allow or disallow an amendment. In the present case, the resulting prejudice to the respondent could not be compensated by costs because of the appellant's *mala fide* in filing the application after a delay of seven months and 27 days and the manoeuvrings of the appellant to delay the sale
B of the said land to Fenomena Kualiti. (paras 42 & 43)

(6) The appellant's contention that the respondent did not have the *locus standi* to object to the amendment application was baseless and unfounded. The respondent as a party to the suit had a
C right to object to the amendment application. The outcome of the suit would definitely affect the legal rights of the respondent. The respondent had sufficient interest to challenge the amendment application. (paras 45-48)

D **(7)** The proposed amendments, even if allowed, were bound to fail. It was a tactical manoeuvre to deprive the respondent of the fruit of its litigation. The appellant also failed to explain adequately the reason for the delay in filing the amendment application despite the presence of the appellant's agent at the
E public auction. It followed that the High Court judge rightly exercised his judicial discretion in favour of the respondent based on the available evidence and the relevant materials. (paras 50 & 51)

Bahasa Malaysia *Translation Of Headnotes*

F

Syarikat perayu telah mengambil pinjaman sebanyak RM1.5 juta dari bank responden bagi maksud pembelian sebuah lot banglo ('tanah tersebut'). Perayu gagal membayar balik dan responden bertindak menjual tanah tersebut melalui lelongan awam. Berikutnya perayu
G memfail permohonan injunksi bagi menghalang responden dari meneruskan lelongan ('permohonan injunksi'). Hakim Mahkamah Tinggi telah menolak permohonan injunksi. Responden meneruskan dengan lelongan dan berjaya menjual tanah tersebut kepada sebuah syarikat bernama Fenomena Kualiti Sdn Bhd ('Fenomena Kualiti')
H dengan harga RM1,548,603. Pelaksanaan lelongan telah dihadiri oleh wakil perayu. Apapun, kira-kira 7 bulan 27 hari kemudian, perayu memfailkan permohonan untuk meminda saman pemulanya terhadap responden bertujuan untuk menambah Fenomena Kualiti sebagai responden kedua ('permohonan pindaan'), dan bagi menghalang
I Fenomena Kualiti dari mengambil milikan atau berurusan dengan tanah tersebut. Hakim Mahkamah Tinggi menolak permohonan pindaan. Perayu merayu ke mahkamah ini di mana rayuan ditentang oleh responden.

Diputuskan (menolak rayuan dengan kos)
Oleh Abdul Malik Ishak HMR menyampaikan penghakiman mahkamah:

(1) Melalui permohonan pindaan, perayu jelas cuba mendapatkan injunksi kali kedua terhadap tanah tersebut. Permohonan injunksi pertama telah ditolak dan perayu memilih untuk tidak merayu terhadap penolakan. Maka doktrin *res judicata* terpakai untuk manfaat responden. Selain itu, isu-isu yang dibangkitkan dalam pindaan telah juga dibangkitkan oleh perayu dalam permohonan injunksi. Sebagai satu perkara undang-undang, perayu tidak boleh membangkitkan isu-isu berkenaan buat kali kedua.

(2) Permohonan pindaan merupakan salahguna proses mahkamah kerana perayu mengkehendaki injunksi yang kedua bagi menghalang urusan terhadap tanah yang menentangi fakta bahawa permohonan injunksi pertama telah pun ditolak. Ia adalah satu percubaaan sia-sia untuk menyerang keputusan lelongan awam dan tidak harus dibenarkan berjaya.

(3) Permohonan pindaan tidak dibuat secara *bona fide*. Kelengahan 7 bulan 27 hari dalam memfailkan permohonan pindaan menunjukkan bahawa tidak wujud ketelitian wajar di pihak perayu.

(4) Pemfailan permohonan pindaan adalah satu muslihat taktikal perayu untuk melengah-lengahkan dan menghalang responden dari menyempurnakan penjualan tanah tersebut kepada Fenomena Kualiti. Perayu sepatutnya merayu terhadap penolakan injunksi pertama dan memohon injunksi Erinford sementara menunggu rayuan ke Mahkamah Rayuan. Perayu sebaliknya telah memfail permohonan pindaan beberapa bulan selepas penolakan permohonan injunksi. Muslihat-muslihat taktikal adalah tidak disukai mahkamah (Lihat *Tetuan Tanjung Teras Sdn Bhd & Ors v. Tetuan Syn Tai Hung Trading Sdn Bhd*; *Lim Nyang Tak Michael v. ACE Technologies Sdn Bhd*; *Ismail Ibrahim & Ors v. Sum Poh Development Sdn Bhd & Anor*).

A **(5)** Kaedah am bahawa pindaan boleh dibenarkan jika pihak lawan tidak mengalami ketidakadilan akibat dari pindaan yang dicadangkan adalah tertakluk kepada pertimbangan lebih penting yang harus diberikan oleh mahkamah kepada kedudukan pihak-pihak apabila melaksanakan budibicara untuk membenar atau
B tidak membenarkan pindaan. Dalam kes semasa, prejudis yang akan menimpa responden tidak boleh dipampasi dengan kos mengambilkira *mala fide* perayu dalam memfail permohonan selepas kelengahan 7 bulan 27 hari serta muslihat perayu untuk melengahkan penjualan tanah tersebut kepada Fenomena
C Kualiti.

(6) Hujah perayu bahawa responden tidak mempunyai *locus standi* untuk membantah permohonan pindaan adalah tidak berasas. Responden selaku pihak kepada tindakan mempunyai hak untuk
D membantah permohonan pindaan. Keputusan tindakan pastinya akan memberi kesan kepada hak undang-undang responden. Oleh itu responden mempunyai kepentingan yang mencukupi untuk menentang permohonan pindaan.

E **(7)** Pindaan yang dicadangkan, jikapun dibenarkan, pastinya akan menemui kegagalan. Ia hanya muslihat taktikal untuk menghalang responden dari mendapat hasil litigasinya. Perayu juga gagal menjelaskan secukupnya akan sebab-sebab berlakunya kelengahan dalam memfail permohonan pindaan walaupun
F wakilnya hadir semasa lelongan dijalankan. Ianya mengikut bahawa hakim Mahkamah Tinggi telah melaksanakan budibicaranya yang memanfaatkan responden dengan betul dan berdasarkan kepada keterangan yang wujud serta bahan-bahan yang relevan.

G **Case(s) referred to:**

Ashmore v. British Coal Corporation [1990] 2 QB 338 ***(refd)***

Carl Zeiss Stiftung v. Rayner & Keeler Ltd And Others; Rayner & Keeler Ltd And Others v. Courts And Others [1967] 1 AC 853 ***(refd)***

Dato' Hari Menon v. Texas Encore LLC & Ors [2005] 2 CLJ 688 HC
H ***(refd)***

Eshah Sa'at v. Meriam Sa'at & Ors [1975] 1 LNS 37 HC ***(refd)***

Government of Malaysia v. Dato Chong Kok Lim [1973] 1 LNS 35 HC ***(refd)***

Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd [1997] 2 CLJ 104 CA ***(refd)***

I *Henderson v. Henderson [1843] 3 Hare 100* ***(refd)***

Ismail Ibrahim & Ors v. Sum Poh Development Sdn Bhd & Anor [1988] 2 CLJ 632; [1988] 1 CLJ (Rep) 606 HC ***(refd)***

Jackson v. Goldsmith [1950] 81 CLR 446 ***(refd)***
Khoo Tau Guan v. Weng Lai Ping & Ors [2004] 5 CLJ 249 HC ***(refd)***
Kirin-Amgen Inc & Another v. Boehringer Mannheim Gmbh & Another; Boehringer Mannheim Gmbh & Another v. Jannsen-Cilag Limited [1997] 24 FSR 289 ***(refd)***
Lim Nyang Tak Michael v. ACE Technologies Sdn Bhd [1995] 1 LNS 118 HC ***(refd)***
Port of Melbourne Authority v. Anshun Proprietary Limited [1980-1981] 147 CLR 589 ***(refd)***
Ramsay v. Pigram [1968-1969] 118 CLR 271 ***(refd)***
Raphael Pura v. Insas Bhd & Anor [2000] 4 CLJ 830 CA ***(refd)***
Sarkawi Sadijo v. BMG Music (M) Sdn Bhd & Ors [1996] 1 LNS 48 HC ***(refd)***
Taisho Company Sdn Bhd v. Pan Global Equities Bhd & Anor [1999] 1 CLJ 703 CA ***(refd)***
Tan Sri Haji Othman Saat v. Mohamed Ismail [1982] 1 LNS 2 FC ***(refd)***
Tetuan Tanjung Teras & Ors v. Tetuan Syn Tai Hung Trading Sdn Bhd [2003] 7 CLJ 124 HC ***(refd)***
Tildesley v. Harper [1878] 10 Ch D 393 ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 24
National Land Code, s. 214
Rules of the High Court 1980, O. 83

For the appellant - Vinod Kamalanathan Ratnam; M/s Vinod Kamalanathan & Assoc
For the respondent - Rabindra S Nathan (Allister Tan with him); M/s Shearn Delamore & Co

[Appeal from High Court, Kuala Lumpur; Originating Summons No: S2-24-259-2004]

Reported by Usha Thiagarajah

JUDGMENT

Abdul Malik Ishak JCA:

Introduction

[1] The appellant (Everise Hectares Sdn Bhd) applied by way of a summons in chambers dated 5 July 2005 to amend the originating summons to add Fenomena Kualiti Sdn Bhd as the second defendant (hereinafter referred to as the "amendment application") and, at the same time, to prevent the proposed second

A defendant from taking possession or dealing with the bungalow land at Lot number DIB 21, Kelab Golf Sultan Abdul Aziz Shah, phase 2, Selangor held under a master title *vide* HS(D) 59439, PT no: 286, Mukim Damansara, daerah Petaling, Negeri Selangor (hereinafter referred to as the "said land").

B

[2] On 11 August 2006, the learned High Court judge dismissed the amendment application. Aggrieved, the appellant appealed to this court.

[3] The respondent bank (Citibank Berhad) vehemently opposed C the present appeal before us.

The Background Facts

[4] The appellant secured a housing loan in the sum of RM1.5 D million for the purpose of purchasing the said land from the respondent bank. The appellant defaulted and the respondent bank decided to sell the said land by way of a public auction.

[5] On 14 February 2004, the appellant filed an application for an E injunction (hereinafter referred to as the "first injunction application") to prevent the respondent bank from proceeding with the public auction of the said land.

[6] All the relevant issues pertaining to the first injunction application were ventilated by the parties fully before the learned F High Court judge. Affidavits and written submissions were also filed in respect of the first injunction application.

[7] On 17 August 2004, the learned High Court judge heard the first injunction application and his Lordship dismissed it with costs.

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[8] Since the path was clear, the respondent bank proceeded with the public auction of the said land. This was on 8 November 2004. And the said land was successfully sold by way of a public auction to Fenomena Kualiti Sdn Bhd at the price of RM1,548,603.

H **[9]** Zakir Basree bin Abdul Rahman affirmed an affidavit on 5 July 2005. From his affidavit at paras. 5 and 6, it was deposed that the appellant was aware of the date of the public auction and had sent an agent to attend but the appellant's agent did not participate in the public auction exercise.

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[10] When the said land was finally auctioned off to Fenomena Kualiti Sdn Bhd on 8 November 2004, the appellant remained passive and idle and took exactly 7 months 27 days to file the amendment application on 5 July 2005.

[11] The written grounds of judgment of the learned High Court judge set out *in extenso* as to why his Lordship dismissed the amendment application and we can do no better than to make reference to them. This was what his Lordship said:

(a) That the grounds in support of the amendment application were similar to the grounds raised in the first injunction application which had already been decided by the High Court. Thus, the issues raised in the amendment application were *res judicata*. In any event, the appellant did not appeal against the dismissal of the first injunction application.

(b) That the amendment application was made in bad faith and constituted an abuse of the process of the court because it indirectly sought to prevent the respondent bank from exercising its legal right to dispose of the said land by way of a public auction.

(c) There was a delay in filing the amendment application and the reason given for the delay was unreasonable.

(d) That the amendment application was not filed *bona fide* because it sought to deprive the respondent bank of the fruit of its litigation when the respondent bank succeeded in the first injunction application.

The Issues Raised In The Amendment Application Are *Res Judicata*

[12] As stated, the amendment application sought for two prayers. Firstly, to add Fenomena Kualiti Sdn Bhd as the second defendant. Secondly, to prevent and to injunct the proposed second defendant from taking possession and/or dealing with the said land.

[13] Clearly by way of the amendment application the appellant sought for a second injunction over the said land although the first injunction application had been dismissed on 17 August 2004 and the appellant chose not to appeal against its dismissal.

[14] In our judgment, the doctrine of *res judicata* ought to apply in favour of the respondent.

[15] Gopal Sri Ram JCA (later FCJ) writing for this court in *Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd* [1997] 2 CLJ 104, CA, had this to say about the principle of *res judicata* at pp. 113 to 114 of the report:

> If authority is needed for the proposition which has commended itself to us, it is to be found in *Government of Malaysia v. Dato Chong Kok Lim* [1973] 2 MLJ 74 which was drawn to the attention of counsel during argument and in which there appears the following passage in the judgment of Sharma J (at p 76):
>
> In *Satyadhyan Ghosel & Ors v. Sint Deorajin Dobi and another* AIR [1960] SC 941, the statement of the law on the subject is given thus:
>
> > The principle of *res judicata* is based on the need of giving a finality to judicial decisions. What it says is that once a *res* is *judicata*, it shall be not adjudged again. Primarily it applies as between past litigation and future litigation. When a matter – whether on a question of fact or a question of law – has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again. This principle of res judicata is embodied in relation to suits in s. 11 of the Code of Civil Procedure; but even where s. 11 does not apply, the principle of *res judicata* has been applied by courts for the purpose of achieving finality in litigation. The result of this is that the original court as well as any higher court must in any future litigation proceed on the basis that the previous decision was correct.
> >
> > The principle of *res judicata* applies also as between two stages in the same litigation to this extent that a court, whether the trial court or a higher court having at an earlier stage decided a matter in one way will not allow the parties to re-agitate the matter again at a subsequent stage of the same proceedings.
>
> A decision given by a court at one stage on a particular matter or issue is binding on it at a later stage in the same suit or in a subsequent suit. (See *Peareth v. Marriott* [1883] 22 Ch D 182, *Hook v. Administrator-General of Bengal & Ors* LR 48 IA 187 and *Re Trusts of the Will of Tan Tye (Deceased) Yap Liang Neo v. Tan Yew*

Ghee and Another [1936] MLJ 141 at pp 147-151). Parties cannot raise a second time in the same suit an issue that has already been determined either expressly or by necessary implication. (See *Louis Dreyfus v. Aruna Chalayya* LR 58 IA 381).

[16] Low Hop Bing J (now JCA) while sitting on the High Court bench had occasion to lay down the principles of *res judicata* in *Dato' Hari Menon v. Texas Encore LLC & Ors* [2005] 2 CLJ 688, at pp. 698 to 700, in these trenchant terms:

Res Judicata

It was argued for the plaintiff that, at the hearing of encl. 9 filed by the plaintiff to continue the *inter partes* injunction, and enclosure (12) filed by the defendant to set it aside, D4 has raised plaintiff's *locus standi* and the jurisdiction of the court, and that on 19 June 2002, Muhamad Ideres J had allowed encl. 9 and dismissed encl 12 ('the two decisions'). D4's appeals against the two decisions are now pending in the Court of Appeal and that, in so far as the High Court is concerned, the issues *viz locus standi* and jurisdiction are *res judicata* and D4 is estopped from raising them here. The following cases were cited:

(1) *Keet Gerald Francis Noel John v. Mohd Noor bin Abdullah & Ors* [1995] 1 CLJ 293;

(2) *Sarkawi bin Sadijo (t/a Jojo's Musical and Promotion House) v. BMG Music (M) Sdn Bhd & Ors* [1996] 4 MLJ 515;

(3) *Kuantan Kuala Lumpur Express Omnibus Co Ltd v. Utama Express Sdn Bhd* [1986] 1 CLJ 598; [1986] CLJ 418;

(4) *Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd* [1996] 1 CLJ 9; and

(5) *Kewangan Utama Bhd v. Cassells Sdn Bhd Anor* [1998] 3 CLJ Supp 295.

D4's response is that the issues of *locus standi* and jurisdiction are not *res judicata* as D4's instant application in encl 26 is independent of encl. 9 and 12, relying on:

(1) *Keet Gerald Francis Noel John, supra*;

(2) *Si Rusa Beach Resort Sdn Bhd v. Asia Pacific Hotels Management Pte Ltd* [1984] 2 CLJ 13; [1984] 1 CLJ (Rep) 346;

(3) *Mohamed Zainuddin bin Puteh v. Yap Chee Seng* [1978] 1 MLJ 40, 42;

A (4) *Tara Rajaratnam v. Datuk Jaginder Singh & Ors* [1981] 232, 234;

(5) *Lee Sem Yoong v. Leong Yoong* [1967] 2 MLJ 86;

(6) *Cheng Hang Guan & Ors v. Perumahan Farlim (Penang) Sdn*
B *Bhd & Ors* [1994] 1 CLJ 19;

(7) *Perumahan Farlim (Pg) Sdn Bhd & Ors v. Cheng Hang Guan & Ors* [1989] 3 MLJ 223, 226; and

(8) *Mothercare Ltd v. Robson Books Ltd* [1979] FSR 466.

C

At this juncture, it is appropriate for me to put in place the relevant principles relating to *'res judicata'* and 'issue estoppel' which I shall refer to interchangeably.

Authorities abound in explaining what these expressions mean. It is
D enlightening to embark on a discussion of some of these authorities.

In *Perspective Management Services Sdn Bhd v. Seganom Sdn Bhd* [2004] 6 AMR 833, Mokhtar Sidin JCA in delivering the majority judgment of the Court of Appeal revisited this doctrine as expounded by the courts in India, England and Malaysia, where his
E Lordship referred to the position as explained by Peh Swee Chin FCJ (as he then was) in *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 at p 197H-I, as follows:

> What is *res judicata*? It simply means a matter adjudged, and
F its significance lies in its effect of creating an estoppel *per rem judicatum*. When a matter between two parties has been adjudicated by a court of competent jurisdiction, the parties and their privies are not permitted to litigate once more the *res judicata*, because the judgment becomes the truth between such parties, or in other words, the parties should accept it
G as the truth; *res judicata pro veritate accipitur*. The public policy of the law is that, it is in the public interest that there should be finality in litigation – interest *rei publicae ut sit finis litium*.

In *Hartecon* the Court of Appeal, through the judgment of Gopal
H Sri Ram JCA at pp 65H to 66C, referred to the judgment of Sharma J at p 76 in *Government of Malaysia v. Dato Chong Kok Lim* [1973] 2 MLJ 74 and the judgment of the Indian Supreme Court in *Satyadhyan Ghosel & Ors v. Sint Deorajin Dobi and Anor* AIR [1960] SC 941 which stated the law on the subject as follows:

I

> The principle of *res judicata* is based on the need of giving a finality to judicial decisions. What it says is that once a *res* is *judicata*, it shall be not adjudged again.

> The principle of *res judicata* applies also as between two stages in the same litigation to this extent that a court whether the trial court or a higher court having at an earlier stage decided a matter in one way will not allow the parties to re-agitate the matter again at a subsequent stage of the same proceedings.

Parties are therefore bound by the doctrine of *res judicata* from re-agitating an issue that had been resolved in earlier proceedings.

[17] I too while sitting on the High Court bench had occasion to ventilate my views about the principle of *locus standi* in *Sarkawi bin Sadijo v. BMG Music (M) Sdn Bhd & Ors* [1996] 1 LNS 48; [1996] 4 MLJ 515, at p. 530 in this way:

> It was obvious, so submitted Mr Valen, that the plaintiff had no *locus standi* to sue the defendants. Before a party can sue in an action he must have *locus standi*. A party may have a cause of action but if he has no *locus standi* to initiate the action the court will, without hesitation, dismiss the action *in limine*. This seems to be the stand of the then Supreme Court in the case of the *Government of Malaysia v. Lim Kit Siang* [1988] 2 MLJ 12, where Salleh Abas LP (as he then was) speaking for the then Supreme Court lucidly remarked at p 20 that:
>
> > Every legal system has a built-in mechanism to protect its judicial process from abuse by busybodies, cranks and other mischief-makers by insisting that a plaintiff should have a special interest in the proceedings which he institutes. This special interest is a nexus between him and the party against whom he brings his complaints to court and is known as *'locus standi'*.
>
> It is germane to mention here that the judgment of Idris Yusof J in *Tengku Jaafar bin Tengku Ahmad v. Karpal Singh* [1993] 3 MLJ 156 on *locus standi* makes for interesting reading.
>
> It is my judgment that on the facts as highlighted by Mr Valen, the plaintiff has no *locus standi* to pursue the matter against the defendants and, consequently, there is no *bona fide* serious issue to be tried.

[18] We now proceed to set out by way of a comparison the issues raised by the appellant for the second time in its amended application with the issues raised in the affidavits and the written submissions of the appellant in its first injunction application:

A (a) That the charge or equitable charge is in the form of an assignment. However, this issue was adequately addressed by the respondent bank in opposing the first injunction application.

(b) That the security document is void under s. 24 of the
B Contracts Act 1950. This issue had been previously raised and dealt with.

(c) That there has been a contravention of s. 214 of the National Land Code 1965. The appellant contended that the assignment amounted to a transfer under s. 214 of the National Land Code
C 1965. However, this issue was adequately addressed by the respondent bank in opposing the first injunction application.

(d) Whether the respondent bank was entitled to dispose of the said land by way of a public auction? This was one of the main
D issues raised in the first injunction application. The learned High Court judge had in fact held that the appellant could not raise this issue again as the High Court had on 17 August 2004 already decided that the respondent bank was entitled to proceed with the public auction when the first injunction
E application was dismissed. It must be recalled that the first injunction application which sought to prevent the respondent bank from disposing of the said land by way of a public auction was dismissed. Thus, the High Court has decided that the respondent bank was entitled in law to proceed with the public
F auction.

(e) That the respondent bank should have registered the charge and also dispose of the said land in accordance with O. 83 of the Rules of the High Court. This issue was raised by the
G appellant in the first injunction application. And it was adequately addressed by the respondent bank.

[19] To compound the matter further, the learned High Court judge found that the following issues sought to be raised in the
H amendment application had been raised by the appellant in the first injunction and they could not be raised again as they were *res judicata*:

(a) that the charge over the said land is void;

I (b) that the agreement is void under s. 24 of the Contracts Act 1950;

(c) that s. 214 of the National Land Code 1965 has been contravened; and

(d) the right of the respondent to auction the said land was not in accordance with the provisions of the National Land Code 1965.

[20] One of the theories on which the doctrine of *res judicata* is based is the finality and conclusiveness of judicial decisions where a party is unable to impeach the correctness of a judgment delivered by a competent court save by way of an appeal. To put it in another way, where issues, factual or legal, have already been determined in previous proceedings neither the parties nor their privies will be allowed to re-litigate those issues in subsequent proceedings (*Ashmore v. British Coal Corporation* [1990] 2 QB 338, CA; and *Kirin-Amgen Inc. & Another v. Boehringer Mannheim Gmbh & Another; Boehringer Mannheim Gmbh & Another v. Jannsen-Cilag Limited* [1997] 24 FSR 289, CA).

[21] When you talk about "privies", Lord Reid in *Carl Zeiss Stiftung v. Rayner & Keeler Ltd. And Others; Rayner & Keeler Ltd. And Others v. Courts And Others* [1967] 1 AC 853, HL, said at p. 910 that "there must be privity of blood, title or interest: here it would have to be privity of interest."

[22] A judicial determination directly involving an issue of fact or law disposes once and for all the issue, so that it cannot afterwards be raised between the same parties or their privies. Now, the estoppel covers only those matters which the prior judgment, decree or order necessarily established as the legal foundation or justification of its conclusion.

[23] *Res judicata* prevents the re-agitation of the same cause of action in later proceedings (*Jackson v. Goldsmith* [1950] 81 CLR 446 at 447; and *Ramsay v. Pigram* [1968-1969] 118 CLR 271 at 280). But the question to pose is this: what amounts to a cause of action? In *Port of Melbourne Authority v. Anshun Proprietary Limited* [1980-1981] 147 CLR 589, 610, Brennan J said the term is used to refer to:

(a) the series of facts which the plaintiff must allege and prove to substantiate a right to judgment;

(b) the legal right which has been infringed; and

(c) the substance of the action, as distinct from its form.

[24] The observations of Wigram VC in *Henderson v. Henderson* [1843] 3 Hare 100, at pp. 114 to 115, should be referred to:

> I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

[25] Applying all these salient principles to the present appeal at hand, it is crystal clear that the issues sought to be raised by the appellant in the amendment application have already been raised in the first injunction application. The appellant, in our judgment, cannot as a matter of the law raise these issues for the second time.

[26] As Sharma J said in the *Government of Malaysia v. Dato Chong Kok Lim* [1973] 1 LNS 35; [1973] 2 MLJ 74, at p. 76:

> The subject of the ground of attack in Enclosure 9 fully covers the subject of attack in Enclosure 33 and, therefore, in my view, the defendant is barred from reagitating the same or a part of the same matter which has already been finally adjudicated upon by Mr. Justice Chang Min Tat. The defendant did not appeal against that decision and so far as Enclosure 9 is concerned the judgment of Mr. Justice Chang Min Tat, in my view, is final and conclusive at this stage of the proceedings.

[27] And his Lordship Sharma J continued to say that (see p. 76):

> The rule is that a matter which might and ought to have been made a ground of attack or defence becomes a matter which was constructively in issue. A matter which might and ought to have been made a ground of attack or defence in the former application but which was not alleged as such a ground of attack or defence is for the purposes of the plea of *res judicata* deemed to have been a matter directly and substantially in issue in the former application, that is to say, though it may not have been actually directly and substantially in issue it is still regarded as, having been constructively,

directly and substantially in issue. There can be no distinction between a claim that was actually made and a claim which might and ought to have been made. The plea of *res judicata* applies, except in special cases, not only to points on which the court was actually required by the parties to form an opinion and to pronounce its judgment thereupon but to every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence might have brought forward at the time. It is only where the plea which is sought to be raised in the subsequent proceedings was not available to the party at the time of the previous proceedings that the decision cannot be constructively *res judicata*. The rule of constructive *res judicata* is really a rule of estoppel. The question now raised has already been heard and finally decided.

The Amendment Application

[28] We categorically say that this amendment application constitutes an abuse of the process of the court because the appellant is indirectly seeking a second injunction to prevent dealings with the said land although the first injunction application had been dismissed on 17 August 2004.

[29] Since the amendment application can conveniently be categorised as a useless attempt to attack the outcome of the public auction, it should not be allowed to succeed. It was an ineffective amendment application that should be nipped in the bud. In similar vein, Abdul Razak J in *Eshah binti Sa'at v. Meriam binti Sa'at & Ors* [1975] 1 LNS 37; [1975] 2 MLJ 97 aptly said:

It has been held that in dealing with the application for amendment, the court has to consider the materiality and effectiveness of the amendment and that it was a well established practice not to allow an amendment where it appeared such an amendment would be useless. The court should look at the probable consequence of the amendment and if the amendment would be ineffectual then it ought not to be allowed to be made. One such amendment was sought to be made in *Ponnusamy v. Nathu Ram* [1959] MLJ 228 and was refused. Clearly, the amendment here, even if allowed, would be of no value because I would not have been persuaded to grant the declaration asked for. To have the desired effect, the Collector's decision must at least be impugned. An amendment would, therefore, have involved making the Collector a necessary party to the action with or without the defendant. To allow the application to amend at the trial stage, therefore, was to make the Collector a party and binding him without first giving him the right of reply.

A **The Amendment Application Was Not Made *Bona Fide***

[30] The learned High Court judge was correct when he held that the amendment application was not made *bona fide*.

B **[31]** The delay of 7 months 27 days before the appellant filed the amendment application on 5 July 2005 showed that there was no due diligence on the part of the appellant.

[32] The delay in applying for an amendment was also considered by this court in *Raphael Pura v. Insas Bhd & Anor* [2000] 4 CLJ 830. C At p. 838, this court had this to say:

> With respect, this is no excuse for the appellant to delay the application for the amendment of his defence at a very late stage without placing sufficient material before the court and to give cogent reasons thereof. It should be noted that an application for D amendment of a writ or pleadings is not as a matter of a right of a party but is left to the judicial discretion of the court depending on the circumstances of each case. In dealing with the amendment to the defence, we would quote a passage from *Gatley on Libel*, 9th edn. (1998) under the caption 'Granting of leave in discretion of E court' at p. 447:
>
> ... the court has shown itself reluctant to grant a defendant leave to amend his defence where the application is made late in the day, either at, or close to, the trial; (*Plummer v. Charman* [1962] 1 WLR 1469, CA), in particular, when he seeks to introduce a plea of F justification at a late stage, the defendant's conduct will be closely inquired into, and the court will expect him to have shown due diligence in making his inquiries and investigations (*Associated Leisure v. Associated Newspapers* [1970] 2 QB 450, CA). It has been held that where delay has been due to the defendant's own default in G some respect, that circumstance should be taken into consideration by the judge as part of the matters to be weighed in deciding whether or not to allow an amendment. The mere fact that delay may be capable of being compensated in money is not conclusive of the question whether the amendment should or should not be permitted (*Bower v. Maxwell*, unreported, 8 May, 1989, 891472, H CA).

[33] In *Taisho Company Sdn Bhd v. Pan Global Equities Bhd & Anor* [1999] 1 CLJ 703, the application for leave to amend was filed four years after the action was commenced and the appellant there was I aware of the facts four years before the action was filed. There was no explanation for the delay and this court concluded that the application for leave to amend lacked *bona fide*.

[34] The lack of *bona fide* also reflected in the case of *Tildesley v. Harper* [1878] 10 Ch D 393, CA. There Bramwell LJ at pp. 396 to 397 aptly said:

> My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting *mala fide*, or that, by his blunder, he had done some injury to his opponent which could not be compensated for by costs or otherwise.

The Filing Of The Amendment Application Was A Tactical Manoeuvre

[35] The filing of the amendment application can best be described as a tactical manoeuvre on the part of the appellant to delay and prevent the respondent bank from completing the sale of the said land to Fenomena Kualiti Sdn Bhd.

[36] Legally speaking, if the appellant intended to prevent the sale of the said land to Fenomena Kualiti Sdn Bhd, the appellant should have taken the following steps:

(a) appealed against the dismissal of the first injunction application; and

(b) applied for an erinford injunction pending the appeal to the Court of Appeal.

[37] Alas, all these were not done by the appellant. Instead the appellant filed the amendment application some months after the dismissal of the first injunction application.

[38] Tactical manoeuvrings were frowned upon by the courts in the following cases.

[39] In *Tetuan Tanjung Teras & Ors v. Tetuan Syn Tai Hung Trading Sdn Bhd* [2003] 7 CLJ 124, where Low Hop Bing J (now JCA) aptly said at p. 129 of the report:

> The defendants' application herein is made at the appeal stage after the learned sessions court judge has arrived at a decision upon consideration of all the pleadings, affidavits and exhibits before him. It seems to me that this is a tactical manoeuvre amounting to an abuse of the process of the court and should be disallowed: *Ismail bin Ibrahim & Ors v. Sum Poh Development Sdn Bhd & Anor* [1988] 3 MLJ 348.

[40] In *Lim Nyang Tak Michael v. ACE Technologies Sdn Bhd* [1995] 1 LNS 118, where Abdul Kadir Suleiman J (later FCJ) rightly held that:

> It was not a question of negligence to plead all those matters in the original defence but a tactical manoeuvre and done in bad faith to delay the rights of the plaintiff on his claim. The application to amend the defence after exposure by the plaintiff in his affidavit in support was a tactic to confuse the issues by creating imaginary 'triable issues' and to stall the plaintiff of his rights. If this was allowed, it would unnecessarily cause prejudice to the plaintiff which could not be compensated by costs.

[41] In *Ismail bin Ibrahim & Ors v. Sum Poh Development Sdn Bhd & Anor* [1988] 2 CLJ 632; [1988] 1 CLJ (Rep) 606, where Mohamed Dzaiddin J (later Chief Justice of Malaysia) aptly said:

> The rule governing the amendment of pleadings is that the court will allow such amendments as will cause no injustice to the other parties. However, there are two circumstances in which an amendment to add an allegation of fraud would not be permitted: (a) where the facts giving rise to the plea of fraud were known at the time of the original pleading and (b) where the delay in pleading fraud was in connection with some tactical manoeuvre.

[42] The general rule that an amendment will be permitted if the opposing party does not suffer an injustice as a result of the proposed amendment must be put to the fore (*Khoo Tau Guan v. Weng Lai Ping & Ors* [2004] 5 CLJ 249). But, in exercising its discretion to allow or disallow a pleading to be amended, the court must consider the position of all the parties.

[43] Here, the resulting prejudice to the respondent bank cannot be compensated by costs because of the appellant's *mala fide* in filing the amendment application after a delay of 7 months and 27 days and the manoeuvrings of the appellant to delay the sale of the said land to Fenomena Kualiti Sdn Bhd.

The Issue Of *Locus Standi*

[44] This issue was incorporated in the memorandum of appeal.

[45] To say as was said by the appellant that the respondent bank cannot object to the amendment application cannot be accepted by this court. Such a contention is totally baseless and unfounded.

[46] As a party to the suit, the respondent bank has a right to object to the amendment application. The outcome of the suit would definitely affect the legal rights of the respondent bank.

[47] The obvious effect of the *locus standi* rule is to exclude some people from obtaining the assistance of the courts in declaring and enforcing the law. That must be the main reason for the appellant to exclude the respondent bank from participating in the amendment application by arguing that the respondent bank had no *locus standi*.

[48] The respondent bank has sufficient interest to challenge the amendment application and has *locus standi* before this court. In *Tan Sri Haji Othman Saat v. Mohamed bin Ismail* [1982] 1 LNS 2; [1982] 2 MLJ 177, at p. 179, Abdoolcadeer J (later SCJ) had this to say:

> The sensible approach in the matter of *locus standi* in injunctions and declarations would be as a matter of jurisdiction, an assertion of an infringement of a contractual or a proprietary right, the commission of a tort, a statutory right or the breach of a statute which affects the plaintiff's interests substantially or where the plaintiff has some genuine interest in having his legal position declared, even though he could get no other relief, should suffice.

Issues Of Bad Faith, Abuse Of The Process Of The Court And The Delay Factor

[49] From the available evidence, the learned High Court judge was entitled to hold that the appellant had acted in bad faith and that there was an unjustified delay in filing the amendment application and that amendment application was an abuse of the process of the court.

[50] The following impinging factors against the appellant cannot be ignored:

(a) the proposed amendments in the amendment application, even if allowed, were bound to fail;

(b) the amendment application was a tactical manoeuvre to deprive the respondent bank of the fruit of its litigation and the failure of the appellant to appeal against the dismissal of the first injunction application; and

A (c) the failure on the part of the appellant to adequately explain the reason for the delay in filing the amendment application despite the presence of the appellant's agent at the public auction.

B **[51]** Based on the available evidence and the relevant materials, the learned High Court judge rightly exercised his judicial discretion in favour of the respondent's bank. We are not inclined to interfere.

Conclusion

C **[52]** For the reasons adumbrated above, we unanimously dismissed the appeal with costs of RM3,000. The deposit should rightly go to the respondent bank.

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